TABLE OF CONTENTS

	Page
Memorandum Opinion of the New York State Court of Appeals dated June 3, 2008.....	1a
Decision of the Appellate Division dated December 26, 2007	5a
Decision of Family Court dated June 30, 2006	27a
United States Constitution, Fifth Amendment	69a
United States Constitution, Fourteenth Amendment	70a
New York State Domestic Relations Law, Section 111(1)	71a

NEW YORK STATE COURT OF APPEALS

No. 136 SSM 14

In the Matter of Seasia D. (Anonymous).

Mr. and Mrs. Anonymous, *et al.*,

Appellants;

Kareem W. (Anonymous),

Respondent.

Tenisha D. (Anonymous),

Respondent.

Submitted by Deanna Balahtsis, *for appellants Mr. and Mrs. Anonymous.*

Submitted by Frederick J. Magovern, for appellant Family Focus Adoption Services, Inc.

Submitted by Janet L. Brown, for respondent Kareem W.

Submitted by Allan D. Shafter, law guardian for respondent Tenisha D.

Submitted by Toba Beth Stutz, law guardian for Seasia D. Adoptive Parents Committee, Inc., *amicus curiae.*

MEMORANDUM:

The order of the Appellate Division should be reversed, without costs, the adoption petition reinstated and the matter remitted to Family Court for further proceedings on the petition in accordance with this memorandum.

In this contested adoption proceeding, Mr. and Mrs. Anonymous filed a petition in Family Court to adopt Seasia, a child born out of wedlock on April 1, 2004 to a 14-year-old mother. We must decide in this appeal whether there is legally sufficient evidence to support Family Court's findings, affirmed by the Appellate Division, that the extrajudicial surrender by the birth mother was invalid, and that the biological father, who intervened in the adoption proceeding, met the criteria for consent. We conclude that there is not legally sufficient evidence to support either of these findings.

First, we do not find record support for the trial judge's determination that the birth mother surrendered Seasia under duress. Tellingly, the birth mother never claimed she was forced to surrender Seasia, did not ask the court to void her extrajudicial consent and was prepared to consent anew. The birth mother has always supported and continues to support Seasia's adoption by Mr. and Mrs. Anonymous.

Nor do we find record support for the trial judge's determination that the biological father is a consent father. For the biological father's consent to be required before an adoption may proceed, he "not only must assert his interest promptly (bearing in

mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody" during the six months prior to the child's placement (*Matter of Raquel Marie X.*, 76 NY2d 387, 402 [1990]; *see also* Domestic Relations Law § 111[1][e]). "The . . . judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgment of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child" (*id.* at 408).

Here, the biological father learned of the birth mother's pregnancy in November 2003, and Seasia was adopted on April 3, 2004. During this crucial six-month period, the biological father, who was 17 years old when Seasia was born, met none of the criteria set out in *Matter of Raquel Marie X.* Instead, the record is replete with excuses for his paternal lapses—*i.e.*, the birth mother (who was 13 when Seasia was conceived and who has consistently maintained that her sexual contact with the biological father was not consensual) and her family were hostile toward him; he relocated to Maryland with his family; he was unaware of the Putative Father Registry maintained by the New York State Department of Social Services; court officials led him to believe that he could not commence a paternity suit until after the child's birth; the birth mother's medical expenses were paid for by Medicaid and, in any event, he was attending high school and was not employed. Finally, assum-

ing without deciding that actions taken by a biological father's family may be attributed to him for purposes of establishing his status as a consent father, the family's gestures in this case (an offer to take the birth mother shopping for maternity clothes and certain telephone calls) were insubstantial.

* * * * * * * * * * * * * * * * * * * *

On review of submissions pursuant to section 500.11 of the Rules, order reversed, without costs, adoption petition reinstated and matter remitted to Family Court, Queens County, for further proceedings on the petition in accordance with the memorandum herein. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 3, 2008

APPELLATE DIVISION OF THE
NEW YORK STATE SUPREME COURT
FOR THE SECOND DEPARTMENT

2007 NY Slip Op 10531
46 AD3d 878

December 26, 2007

As corrected through
Wednesday, February 13, 2008

In the Matter of Seasia D.
Mr. Anonymous et al.,

Appellants,

Kareem W.,

Respondent.

Tenisha D.,

Nonparty Appellant.

Deana Balahtsis, New York, N.Y., for petitioners-appellants Mr. Anonymous and Mrs. Anonymous.

Magovern & Sclafani, New York, N.Y. (Frederick J. Magovern of counsel), for petitioner-appellant Family Focus Adoption Services.

Shafter & Shafter, Port Washington, N.Y. (Allan D. Shafter of counsel), Law Guardian for nonparty appellant.

Janet L. Brown, Jamaica, N.Y., for respondent.

Toba Beth Stutz, Jamaica, N.Y., Law Guardian.

In an adoption proceeding pursuant to Domestic Relations Law article 7, the prospective adoptive parents, the petitioners Mr. Anonymous and Mrs. Anonymous, the petitioner Family Focus Adoption Services, and the nonparty birth mother Tenisha D., separately appeal from an order of the Family Court, Queens County (DePhillips, J.), dated June 30, 2006, which, after a hearing, in effect, denied the petition and dismissed the proceeding.

Ordered that the order is affirmed, without costs or disbursements, and the matter is remitted to the Family Court, Queens County, to set a date for the production of the child by the prospective adoptive parents, for a determination of where the subject child shall reside pending resolution of the biological father's custody proceeding, and for a determination of the biological father's custody proceeding.

In the instant case, the Family Court denied the adoption petition on the grounds that the biological father was a "consent father," that is, one whose consent to the adoption is mandated by statutory and due process requirements, who did not consent to the adoption, and that the extrajudicial consent of the birth mother was invalid. The prospective adoptive parents and their private adoption agency

argue on appeal that the biological father, by his conduct, failed to qualify as a "consent father," and that the adoption petition thus should have been granted without the necessity of obtaining his consent. They further argue that, to the extent that the birth mother's extrajudicial consent to the adoption was invalid, any irregularity could and would be easily rectified by her execution of a new, valid consent. The Law Guardian for the birth mother, who was 14 years old when the subject child was born, similarly contends that although her extrajudicial consent to the adoption was in fact invalid, the biological father's consent was not required and that she is prepared to execute a new consent providing for an open adoption. The Law Guardian for the child argues that the Family Court properly determined that the biological father is a "consent father." We note that the birth mother was a foster child who was herself adopted shortly before she and the biological father learned that she was pregnant.

On the question of whether the biological father's consent was required as a condition to the adoption, Domestic Relations Law § 111(1)(e) states that if the child is under six months old at the time of placement, a nonmarital father has a right to consent if he lived with the mother for six months immediately preceding the placement of the child for adoption, held himself out as the father during that period, and paid a reasonable sum in accordance with his means for the expenses of the birth. In *Matter of Raquel Marie X.* (76 NY2d 387 [1990], *cert. denied sub nom. Robert C. v Miguel T.*, 498 US

984 [1990]), the Court of Appeals held that the "living together" requirement was unconstitutional, declaring the provisions nonseverable and therefore unconstitutional in their entirety. Pending the Legislature's formulation of a new standard (which the Legislature has yet to accomplish) the Court of Appeals set forth judicially-created interim criteria, to wit, a willingness to assume full custody in the six months prior to the placement of the child for adoption, evidenced by payment of pregnancy and birth expenses, and a public acknowledgment of paternity within the six months immediately preceding the child's placement for adoption (*see Matter of Robert O. v Russell K.*, 80 NY2d 254 [1992]).

In the instant case, the evidence at the hearing established that, during the relevant six-month period, the biological father publicly acknowledged paternity and exhibited a willingness to assume full parental responsibilities. However, those efforts were rebuffed by the birth mother's family. We note that certain hearsay evidence with respect to this issue was admitted by the Family Court not for the truth of the statements, but to "know the circumstances" to which the biological father was responding. Contrary to the appellants' contentions, this evidence was admissible for that purpose and to show state of mind (*see Matter of Marino S.*, 100 NY2d 361, 372 [2003], *cert denied sub nom. Marino S. v Angel Guardian Children & Family Servs.*, 540 US 1059 [2003]; *Matter of Doreen J. v Thomas John F.*, 101 AD2d 862 [1984]).

The biological father first learned of the birth mother's pregnancy in November 2003, when she was already five months pregnant, and he immediately believed that the child was his. The following Sunday, the birth mother's family and the biological father's family met at the home of the biological father's aunt. According to the biological father, the purpose of the meeting was to "clarify that I did not rape" the birth mother and because "I wanted to see her; she was pregnant."

The birth mother's adoptive mother (hereinafter the maternal grandmother) was deceased at the time of the hearing. However, at the hearing, the biological father's aunt testified that the maternal grandmother said she did not believe that the biological father forcibly raped the birth mother. The birth mother's adult adoptive sister (hereinafter the aunt) confirmed that, at the meeting, the maternal grandmother did not believe the allegations of forcible rape. Since the biological father was a minor at the time he had sexual relations with the birth mother, his conduct could be classified as sexual misconduct on the ground that the birth mother was under 17 years old (*see* Penal Law § 130.20), but it could not be classified as statutory rape (*see* Penal Law §§ 130.25, 130.30). Accordingly, contrary to the contention of our dissenting colleague, there is no basis to conclude that the biological father's concerns were more penal than paternal.

At that meeting, the paternal grandmother, speaking on behalf of the biological father's family, asked if anything could be done for the child. The

maternal grandmother's response was that something could be done if the biological father or the paternal grandmother "could find her."

Two days later, the paternal grandmother called the aunt and offered to go shopping and buy maternity clothes. The aunt replied that "Mom [referring to the maternal grandmother] does not want anything from you." Thereafter, the paternal grandmother called the aunt every two or three days at the biological father's request, and asked to speak to the birth mother.

The fact that the biological father involved his own mother in the process militates in his favor since it demonstrated a public acknowledgment of paternity and an intent to secure custody with her help (*cf. Matter of Michael*, 272 AD2d 618 [2000]). The evidence in the record establishes that the paternal grandmother acted at her son's repeated requests. The biological father asked the paternal grandmother to call the aunt because the two women had a relationship with each other which was "really close." He expected that if his mother called, she would be permitted to speak to the birth mother, a situation which would then allow him to "take the phone" and speak to the birth mother immediately thereafter. However, the birth mother's family stopped taking telephone calls. The paternal grandmother tried calling from a third party's telephone, but once the aunt realized who was calling, she claimed she "couldn't talk," promised to call back, but never did. The birth mother confirmed that the maternal grandmother prohibited her from contacting the biological father.

The aunt testified that during the period when the aunt was still conversing with the paternal grandmother, the birth mother apparently had not decided what to do with respect to the pregnancy. The aunt claimed that she had taken the birth mother to an abortion clinic and learned that a late abortion would require a two-day procedure which was too difficult for a girl as young as the birth mother to bear. The aunt testified that no decision could be made as to the pregnancy because it was "up to" the maternal grandmother.

The aunt's testimony was corroborated by the birth mother's testimony that the maternal grandmother threatened to "put me out [of] the house 'cause she don't want no teenager girl pregnant in her house." The birth mother gave this threat credence, since she was a foster child recently adopted by the maternal grandmother and her biological sister had been returned to foster care by the maternal grandmother. The birth mother confirmed that she went to an abortion clinic. Thereafter, she went to an adoption agency. It is not disputed that the adoption agency was not contacted until January 2004, and the birth mother's first appointment with the adoption agency was in the third week of January 2004.

During this period, the biological father was unable to ascertain where the birth mother lived. He went to the birth mother's church in hopes of seeing her there, but her family was keeping her home. The paternal grandmother called a list of child welfare agencies in an attempt to determine where the birth mother lived and, in fact, reached

a caseworker from Seamen's Society for Children and Families, which had handled the adoption of the birth mother. The caseworker provided no information. The biological father asked the birth mother's family if he could be present at the birth of the child, but was told that he would be arrested for statutory rape if he attempted to do so.

The biological father testified that he attempted to commence a paternity proceeding in the Family Court, Richmond County, but was told to wait until he knew that the child was born. This was incorrect, since Family Court Act § 517 authorizes the commencement of a paternity proceeding during the mother's pregnancy. Moreover, the biological father was unaware of the Putative Father Registry maintained by the New York State Department of Social Services.

The biological father testified that if he knew where the birth mother was giving birth, he would have gone, despite the threat that he would be arrested. However, he was not notified of the adoption until nine days after the child's birth, when the aunt called the paternal grandmother and told her that she could "stop harassing" the birth mother's family because the baby had been born, and "we gave it away." At that juncture, the paternal grandmother went through old church papers and found an envelope with an unfamiliar address on it which she suspected might be the birth mother's address. The biological father, the paternal grandmother, and a cousin went to that address and confirmed that it was the birth mother's address, when they saw the maternal grandmother's car in front

of the house. The biological father promptly commenced a paternity proceeding and a custody proceeding less than one month after the child's birth.

Although the paternity proceeding and the custody proceeding were commenced after the child was placed for adoption, the biological father's conduct prior to the child's placement for adoption, which included a public acknowledgment of paternity, efforts to provide support which were rebuffed, and efforts to witness the birth which were rebuffed, were sufficient to establish that his consent is required for the placement of the child for adoption (*see Matter of Kiran Chandini S.*, 166 AD2d 599 [1990]; *see also Matter of Matthew D.*, 31 AD3d 1103 [2006]). The father's efforts were not so much rebuffed by threats—since it became apparent that threats would not work—but by the efforts of the birth mother's family to keep her plans a secret and to insure that the biological father played no parental role whatsoever. Since he was not informed of the birth mother's plans or the child's birth until after the child was surrendered for adoption, his failure to immediately assume custody cannot be considered a waiver (*see Matter of Kiran Chandini S.*, 166 AD2d 599 [1990]).

Since the birth mother's medical expenses were paid by Medicaid, the biological father's failure to contribute to those expenses is thus not determinative (*see Matter of Kiran Chandini S.*, 166 AD2d 599 [1990]).

In addition, the relocation of the biological father's family to Maryland on January 30, 2004, during the birth mother's pregnancy, cannot be

deemed to constitute a waiver. The birth mother's family knew about the planned move before they knew about the birth mother's pregnancy. The biological father and the paternal grandmother discussed the move with the birth mother's family and left their forwarding address, the addresses and telephone numbers of other close relations in both Maryland and New York, and the paternal grandmother's mobile telephone number. The aunt acknowledged that she had the paternal grandmother's mobile telephone number. A mutual friend from the biological parents' church also delivered this information to the birth mother, and told her "Don't forget us." The birth mother confirmed that she received this information. The friend was rebuked by the maternal grandmother for providing that information to a minor without parental permission. The attempts to reach the birth mother's family by telephone continued after the move to Maryland, to no avail.

This case is thus diametrically different from *Matter of Baby Boy C.* (13 AD3d 619, 620 [2004]), cited by our dissenting colleague, where a biological father "abandoned" the mother by moving to North Carolina during the birth mother's pregnancy without informing her of his whereabouts.

Our dissenting colleague, while acknowledging that the biological father's exercise of supervised visitation after he was adjudicated the legal father in October 2004 is not relevant to our determination of whether he is a "consent father," nevertheless cites testimony by the prospective adoptive father that the supervised visits by the biological

father were "at best, unreliable and sporadic . . . indicating a lack of any serious interest in forming a full father-child relationship." The record with respect to supervised visits is at best incomplete, since there has been no hearing with respect to the best interest of the child. However, it is clear that—although the visits are professionally supervised—one of the prospective adoptive parents insisted on being present and would not permit the father to take the child to a more appropriate setting, such as a nearby park. Further, during the periods in which the biological father was in New York for the hearing, the prospective adoptive parents canceled consecutive scheduled visits. Therefore, the biological father's numerical record of attendance at scheduled visits is not a basis to conclude that he lacks any serious interest in forming a parent-child relationship with the child.

Thus, we reject the appellants' contention that the biological father, by his conduct, forfeited his status as a "consent father."

Further, we agree with the Family Court that the extrajudicial surrender by the birth mother, who was 14 years old at the time, was invalid since she was acting under the duress imposed upon her by the maternal grandmother, who threatened to return her to foster care if she did not execute the surrender. Moreover, she did not have independent counsel, and her wishes for an open adoption were not explicitly provided for (*see* Social Services Law § 384[5]; *Matter of Baby Boy L.*, 144 AD2d 674 [1988], *cert denied sub nom. Laurence v Anony-*

mous, 493 US 918 [1989]; *Matter of Male L.*, 125 Misc 2d 420 [1984]).

Further, we note that the Legislature's failure to amend Domestic Relations Law § 111(1)(e), which was declared unconstitutional 17 years ago (*see Matter of Raquel Marie X.*, 76 NY2d 387 [1990]), in order to provide statutory criteria in the place of what was supposed to be an interim judicial standard, renders the determination of difficult cases such as this even more difficult. We urge the Legislature to act without further delay.

Thus, we remit the matter to the Family Court, Queens County, for further proceedings consistent herewith, including a determination with respect to the biological father's custody petition. We note that the birth mother has, to date, not petitioned for custody of or visitation with the child. Crane, J.P., Goldstein and Carni, JJ., concur.

Dillon, J. (dissenting and voting to reverse the order appealed from, on the law, on the facts, and in the exercise of discretion, and to remit the matter to the Family Court, Queens County, for the execution by the birth mother of a new extrajudicial consent to the adoption of the subject child, the filing of an amended petition within 90 days, and a determination on the amended petition thereafter, with the following memorandum): While I concur with the majority that the extrajudicial consent executed by the birth mother was invalid, I respectfully dissent from that portion of the decision which concludes that the biological father's consent to the adoption was required.

Domestic Relations Law § 111(1)(e) is the consent statute that is relevant here, because the child was under six months of age at the time she was placed for adoption. In 1990, the New York Court of Appeals, in *Matter of Raquel Marie X.* (76 NY2d 387 [1990]) struck down as unconstitutional the portion of Domestic Relations Law § 111(1)(e) that required cohabitation of the birth parents, and called upon the Legislature to enact a replacement statute. The New York Legislature has yet to amend Domestic Relations Law § 111 to correct its constitutional infirmities. Thus, in determining whether or not an unwed father has the right to consent to the proposed adoption of his less-than-six-month-old child, courts must follow the interim judicial criteria set forth by the Court of Appeals in *Matter of Raquel Marie X.* (76 NY2d 387 [1990]). I do not agree with the majority that the biological father in this case has satisfied the required judicial criteria.

The Court of Appeals, in *Matter of Raquel Marie X.*, conducted a thorough analysis of the evolution of United States Supreme Court case law and New York statutory provisions to explain that "[u]ntil the 1970's, unwed fathers had no legally recognized interest" in the father-child relationship (*id.* at 397), but that since the 1970's, "the interest of unwed fathers in a relationship with their children has gained significant recognition in the law" (*id.* at 401).

The interests of unwed fathers cannot be taken lightly in this or any action. The protected interest of an unwed father, however, is by no means

absolute and "is not established simply by biology" (*id.*). As declared by the Court of Appeals, "[t]he unwed father's protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one" (*id.* [citation omitted]). Thus, in a proposed adoption by strangers, an unwed father's interest in the father-child relationship is protected "so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child" (*id.* at 402 [citations omitted]). According to the Court of Appeals, in order for an unwed birth father: "to have the benefit of the maximum protection of the relationship—the right to consent to or veto an adoption—[he] not only must assert his interest promptly (bearing in mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody of the child" (*id.* at 402).

In evaluating a father's ability and willingness to assume custody, courts examine whether the father (1) publicly acknowledged paternity, (2) paid for medical and related pregnancy and birth expenses, (3) took steps to establish legal responsibility for the child, and (4) took any other steps to demonstrate his commitment to the child (*see Matter of Robert O. v Russell K.*, 80 NY2d 254, 262 [1992]; *Matter of Raquel Marie X.*, 76 NY2d at 405-406, 408; *Matter of Baby Boy C.*, 13 AD3d 619, 620 [2004]). A birth father can lose his interest in the father-child relationship if he fails to "grasp such opportunities for a significant relationship" (*Matter of Raquel Marie X.*, 76 NY2d at 402).

In enunciating the standard to be applied pending legislative action, the Court of Appeals declared, in pertinent part, that: "[i]n the case of newborn infants . . . the qualifying interest of an unwed father requires a willingness himself to assume full custody of the child—not merely to block adoption by others . . . An assertion of custody is not all that is required" (*id.* at 408).

The Court of Appeals determined that "the manifestation of parental responsibility must be prompt" (*id.*). Moreover, upon giving due consideration to the remaining portions of Domestic Relations Law § 111(1)(e) that were unchallenged in *Matter of Raquel Marie X.*, the Court of Appeals reiterated that the "period in which the father's manifestation of responsibility for the child is to be assessed [is] the six continuing months immediately preceding the child's placement for adoption" (*id.*; *see also Matter of Baby Boy C.*, 13 AD3d at 620).

Here, the record reveals that when the subject child was born, the biological father and birth mother were 17 and 14 years old, respectively. The biological father learned of the birth mother's pregnancy in November 2003. The child was born on April 1, 2004. The birth mother executed a nonjudicial surrender of the child on April 3, 2004. Accordingly, the relevant time period under *Matter of Raquel Marie X.* for determining whether the biological father manifested an intention to assume custody of the child is confined to the pregnancy as of November 2003 to the child's birth on April 1, 2004 and to the surrender that occurred a mere two

days after the birth. Several events that occurred during that time frame, or which failed to occur, lead me to conclude that the biological father falls short of meeting the requirements established by the Court of Appeals for him to be deemed a "consent father."

The first event was a meeting between the families of the birth mother and the biological father in November of 2003. The meeting was conducted at the home of the biological father, and was secretly videotaped by a member of his family. The purpose of the meeting, according to the biological father, was "to clarify that [he] did not [forcibly] rape [Tenisha]," as the maternal grandmother and her church pastor had stated that he could be arrested for rape. The paternal grandmother also testified that the purpose of the meeting was to discuss rape. Efforts were made by the biological father's family, while the videotape was rolling, to secure the birth mother's recantation of prior allegations of forcible rape. Though the biological father could not, in fact, be prosecuted for rape because of his age (*see* Penal Law §§ 130.35, 130.30, 130.25), a fact that he and his family may not have known at that early stage of events, he was subject to criminal prosecution for sexual misconduct under Penal Law § 130.20. At no time during the families' meeting did the biological father make any statement that he wanted to parent the child, according to both his own testimony, as well as that of the birth mother (*see Matter of Micah HH.*, 261 AD2d 723, 725 [1999]). The overriding concern of the biologi-

cal father and his family, at that time, was penal rather than parental.

The second event during the relevant period, mentioned by the majority, was a single trip by the biological father to the birth mother's church in the hope of seeing her, since he was uncertain at that time where she was residing. The majority misconstrues the significance of this trip. Any effort made by the biological father to see the birth mother and speak with her was not tantamount to manifesting an intention to assume custody of the child upon birth. Similarly, any desire that the biological father expressed to be present at the birth, while perhaps showing support for the birth mother, did not evidence his intention to assume custody of the child.

Third, against the backdrop of the birth mother having spoken with police and prosecutors about potential rape charges, which she ultimately decided not to pursue, and the videotaped meeting between the birth families about rape, the biological father and his family moved out of the jurisdiction, to Maryland, on January 30, 2004. A distant relocation during the pregnancy, as occurred here, is significant and has been held by this Court to be inconsistent with a manifestation by a father to assume custody of a child (*see Matter of Baby Boy C.*, 13 AD3d 619 [2004] [father denied "consent" status for, inter alia, relocating to North Carolina during pregnancy]).

Fourth, while the biological father acknowledged paternity to his own mother, he never registered, at any time, with the New York State Putative

Father Registry pursuant to Social Services Law § 372-c.

Fifth, given the biological father's age and lack of income, he can be excused from any expectation of providing meaningful financial assistance for medical and pregnancy-related expenses. However, even considering the biological father's limited financial means, during the relevant period he never attempted to transmit to the child or to the birth mother, either directly or through third parties that knew the birth mother's whereabouts, so much as a stuffed animal, bib, or rattle.

Sixth, the trial court, and my colleagues in the majority, err, as a matter of law, in attributing, to the biological father, certain limited offers of assistance made by the paternal grandmother toward satisfaction of the "consent father" requirements, such as offering to provide some maternity clothes and the making of certain phone calls. In *Matter of Raquel Marie X.*, the Court of Appeals, in establishing the interim judicial criteria for evaluating unwed fathers' conduct, directed the courts to "give due weight to the remaining portions of Domestic Relations Law § 111(1)(e)" (*Matter of Raquel Marie X.*, 76 NY2d at 408). The plain and unambiguous language of Domestic Relations Law § 111(1)(e) provides that its factors apply to "the father, *whether adult or infant,* of a child born out-of-wedlock" (emphasis added). The language chosen by the Legislature appears to be deliberate, in focusing our attention solely upon the father, regardless of his infancy or majority. Necessarily, the statute excludes consideration of the conduct of proxy individuals such as, in this instance, the child's paternal grandmother (*see Matter of Kyle,* 156 Misc 2d 260, 265 [1992], *affd* 195 AD2d 1014 [1993]).

The involvement of the paternal grandmother, which the trial court and the majority interpret as favoring the biological father, is instead irrelevant under the plain and unchallenged language of Domestic Relations Law § 111(1)(c), and is not interpreted as relevant by decisional authority (*see Matter of Michael E. J.*, 84 AD2d 816, 817 [1981] [visits and gifts from biological father's family is no substitute for visits and gifts from the biological father under Domestic Relations Law § 111(6)(a)]; *cf. Matter of Michael*, 272 AD2d 618 [2000]). Moreover, the argument that the biological father should be credited with efforts of his own mother severely undercuts, and is inconsistent with, proof that he had the "*ability* and willingness to assume custody of the child" as required by the Court of Appeals in *Matter of Racquel Marie X.* (at 402; emphasis added).

Seventh, my colleagues in the majority qualify the biological father as a "consent father" on the basis of acknowledgment of paternity, efforts by the paternal grandmother to provide support such as by offering some maternity clothes, and efforts by the biological father to witness the birth which were rebuffed. The latter point regards testimony by the biological father and the paternal grandmother of an out-of-court statement by Pastor Kelly of the maternal grandmother's church that the biological father would be arrested if he were to go to the hospital to witness the birth. It was error for the trial court to rely on this piece of evidence as a principal basis for its determination. Assuming its admissibility into evidence not for its truth, but to explain the biological father's state of mind in reacting to the pastor's statement (*see generally*

Prince, Richardson on Evidence § 8-106 [Farrell 11th ed]), the biological father nevertheless testified that had he known where the birth occurred, he would have tried visiting the birth mother anyway (*accord Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 14 AD3d 325, 341 [2005], *affd* 6 NY3d 265 [2006]). Thus, the biological father's efforts were not subject to any meaningful threats, and such evidence does not support the trial court's finding that he was prevented from fulfilling the expectations of the constitutional portions of Domestic Relations Law § 111(1)(e) and *Matter of Raquel Marie X.*

None of the seven circumstances discussed above, standing alone, would warrant a finding that the biological father fails to qualify as a "consent father" in this proceeding. However, all of these seven circumstances, viewed collectively, divest him of "consent father" status.

The majority relies upon this Court's decision in *Matter of Kiran Chandini S.* (166 AD2d 599 [1990]), to support its position that the biological father did not waive any custody rights because his family's alleged efforts to help the birth mother were declined and he was not informed of the birth until the child had already been surrendered for adoption. That case is easily distinguishable on its facts. The reason why the father in *Matter of Kiran Chandini S.* did not himself assume custody was because he did not believe that the birth mother would place the child for adoption. Here, the testimony of the biological father evidences his understanding, as early as November 2003, that the

birth mother was not going to raise the child. Despite that knowledge, the biological father moved to Maryland, failed by his overall conduct during the relevant period to manifest any ability or willingness to assume custody over the child,* and did not promptly or actually file petitions to establish paternity or obtain custody of the child until after the child had been placed for adoption. These facts do not support a finding that the biological father qualifies as a "consent father" (*see Matter of Nicholas X.R.*, 246 AD2d 311 [1998]).

Assuming that the issue of the birth mother's extrajudicial surrender of the baby was properly before the trial court in its role as parens patriae over the birth mother, who was herself a minor, the surrender was properly annulled by the Family Court. However, given the birth mother's consistent and continuous assertion that she would, under such circumstances, merely re-execute an enforceable surrender, she should be permitted the

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* The biological father returned to New York after the child was born and only then filed custody and paternity petitions. He was ultimately adjudicated the father in October 2004 and granted supervised visitation with the child in January 2005. While the post-surrender time period is not relevant to the issue of whether or not an unwed biological father of a child under six months old has gained a protected interest in that relationship, entitling him to consent to or veto an adoption (see *Matter of Raquel Marie X.*), it is noteworthy that even after he was awarded supervised visitation with the child in 2005, the biological father's visits were, at best, unreliable and sporadic, with less than 50% attendance, thereby indicating a lack of any serious interest in forming a full father-child relationship (*see Matter of Baby Girl U.*, 224 AD2d 869, 870 [1996]).

opportunity to do so (*see* Social Services Law § 384[1][c]; 2 [a]-[b]).

Finally, as noted by the majority, the Legislature has failed for 17 years to amend Domestic Relations Law § 111(1)(e) since the Court of Appeals rendered its decision in *Matter of Raquel Marie X.* This split bench evidences the disservice to families within the state occasioned by the Legislature's failure to act.

Since the biological father has not satisfied the criteria set forth in *Matter of Raquel Marie X.*, in that he failed during the relevant six-month period preceding the child's placement for adoption to promptly assert his willingness and ability to assume custody of the child, I respectfully dissent from the portion of the majority's decision which concludes otherwise. While this appeal does not lend itself to easy solution, the more proper result under the facts and applicable law is to reverse the order dated June 30, 2006, denying the petition, stay any transfer of custody of the child to any other person for a period of 90 days pending the birth mother's execution of a new and valid judicial surrender of the child, grant the petitioners Mr. Anonymous and Mrs. Anonymous leave to file an amended petition for adoption within those 90 days, and direct the Family Court to make a determination on the amended petition thereafter, without requiring the consent of the biological father.

QUEENS COUNTY FAMILY COURT

Decision and Order of DePhillips, J.

On December 3, 2004, petitioners, Mr. and Mrs. Anonymous, filed their petition for adoption of the child Baby Girl Seasia, born on April 1, 2004 in Queens, New York. According to their verified petition dated October 23, 2004, they obtained the child when the birth mother surrendered the child to Family Focus Adoption Services which then placed the child with them. They represent that no father was named on the birth certificate, the birth mother did not name a father and there is no male whose consent to the adoption is necessary. They further represent on information and belief there are no persons entitled to notice of this proceeding pursuant to Section 111(3) and 111(a) of the Domestic Relations Law with the exception of Kareem W_____. The petition lists as counsel for the petitioners Ms. Deana Balahtsis, Esq. The affidavit of fees paid Family Focus Adoption Services subscribed by Ms. Kathy P. Stojowski notarized October 15, 2004, reflects petitioners' payment of $14,000 to Family Focus Adoption Services for all services related to the adoption of the child with an additional $1,000 to be paid. The agency verified schedule dated October 25, 2004, states that Tenisha D_____ is the birth mother and Kareem W_____ is the birth father of the child Seasia. The schedule further reflects that the consent by the birth mother to the adoption is unnecessary because she signed a surrender on April 3, 2004 and the consent by the birth father is unnecessary because he is only entitled to notice. Annexed to the petition is an affirmation regarding

the birth father subscribed by attorney Balahtsis in which she states that she is the attorney for the petitioners. Also annexed is the unconditional extrajudicial surrender of the birth mother, dated April 3, 2004, reflecting the birth mother's date of birth as February 18, 1990 and the date of birth of Baby Girl Seasia as April 1, 2004. The birth mother was fourteen years, one month and two weeks old when she signed this extrajudicial surrender. All concede that the birth mother was not represented by independent counsel at the time of the surrender. Notably there is annexed to the petition a document entitled "Consent To Adoption By Grandparent" dated April 3, 2004, which states in pertinent part: "I am aware that my daughter, Tenisha D____, has given birth on April 1, 2004. . . . My daughter and I have discussed her plans to place the baby for adoption, and I fully support the decision, because I believe adoption to be in this infant's best interests. I do hereby accordingly consent to my grandchild's placement for adoption." Parenthetically it is noted that on Page 5 of the affidavit of Agency investigation subscribed by Ms. Stojowski the Deputy Director of Family Focus Adoption Services, it is asserted that "Mr. and Mrs. Anonymous had maintained phone contact with Seasia's birth mother and family, but the birth family recommended that Mr. and Mrs. Anonymous move on with their new life and break all contacts with them."

As already noted, the subject child was born April 1, 2004. On April 3, 2004, two days later, the young teenage birth mother signed an extrajudicial

surrender of her child to Family Focus Adoption Services without benefit of independent legal counsel. Almost concomitant with the surrender, Family Focus Adoption Services placed the child in the physical custody of petitioners, Mr. and Mrs. Anonymous. The court takes judicial notice of the following: On April 23, 2004, approximately three weeks after the birth of the child, Kareem W_____ filed a paternity petition (P 1758/04) and a custody petition (V-1760/04) in Family Court, Richmond County, seeking to be declared the father of and to obtain custody of the subject child.[1] In his verified petition for custody, he states: "He has been barred from mother and child. Mother's parents do not want mother to keep child. They want the child put up for adoption. Father does not know the whereabouts of his child. Maternal grandparents no longer want mother to remain in her home. Maternal grandparents have separated mother from her child. Father does not want the child given up for adoption. Father can and will provide for daughter with a safe, stable, nurturing and loving home. Father has the assistance of his family". The Family Court, Richmond County, dismissed these two petitions without prejudice on the same day they

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[1] Family Court may properly take judicial notice of court files including its own prior proceedings, underlying proceedings, and prior proceedings though a different court (*In re Stephanie S.*, _Ad3d_, 813 N.Y.S.2d 720 [1st Dept. 2006], *In the Matter of Anjoulie, J.*, 18 AD3d 984, 794 N.Y.S.2d 709 [3rd Dept. 2005]; *In the Matter of Justin EE.*, 153 AD2d 772, 544 N.Y.S. 2d 892 [3rd Dept. 1989]). The record includes the transcribed minutes (22 NYCRR §205.5).

were filed because in its view, there was a lack of jurisdiction in that the father at the time filing was a resident of Maryland and the mother resides in Queens.[2] Undaunted, the putative father Kareem W_____, filed a petition for paternity (P-07617/04) and a petition for custody of the subject child (V-07618/04) in Family Court, Queens County, three days later, on April 26, 2004 against the birth mother. In his petition for custody he states: "the Respondent mother told me she gave the baby away. The Respondent states that she does not want the child. I feel that if I am the father of the subject child I want to take care of my child and be there for her". Process issued for the respondent mother. On the adjourned date of July 6, 2004, Deana Balahtsis appeared as attorney for the respondent birth mother. The petitioner putative father and his mother appeared. The respondent mother did not appear. Phyllis D____, the birth mother's adoptive mother appeared. The custody proceeding was before Part 45. The paternity proceeding, returnable that same day, was before Part 23. At this time, July 6, 2004, both the petitioner and the respondent are unemancipated minors. Based on the representation by respondent's law guardian that her client denies that petitioner is the father and upon the request of respondent's law guardian, the custody petition was dismissed without preju-

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[2] Family Court of the State of New York has statewide jurisdiction. The issue in entertaining these petitions related to venue, not jurisdiction.

dice with leave to the putative father to re-file once paternity is established.[3]

In the paternity matter on April 26, 2004, the respondent birth mother's law guardian, attorney Balahtsis, informed the court that her client signed a surrender of the subject child three months ago with Family Focus Adoption Services. The Support Magistrate denied counsel Balahtsis request to dismiss, directed respondent mother appear on the adjourned date, and directed notice be given to Family Focus. The proceeding was adjourned to September 8, 2004. On September 8, 2004, the petitioner and his mother appeared. Respondent birth mother and her adoptive mother appeared. Ms. Maris Bleshner, Director of Family Focus Adoption Services appeared. Respondent's law guardian, Deana Balahtsis, appeared. The petitioner consented to DNA testing. The respondent mother consented to such testing, but her law guardian took the position that the birth mother cannot consent since she surrendered her rights! Family Focus through its director consented to DNA tests. The matter was adjourned to October 15, 2004. On October 1, 2004, petitioner Kareem W_____ filed a petition for custody of the subject child (V-17442/04) while this paternity petition was pending. In that petition he represents:

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[3] The putative father is cloaked with preliminary standing to file for custody with the issue of standing to reach best interest to be resolved subsequently either upon a finding of paternity or a finding of exceptional circumstance. Under the circumstances herein, adjournment rather than dismissal is the appropriate practice.

> "[Mr. and Mrs. Anonymous] obtained physical custody of the child on April 4, 2004 as follows: Petitioner states the child has been residing with them since birth, straight from the hospital. It would be in the best interests of the child to have custody awarded to Kareem W_____ for the following reasons: Petitioner states he has not and will not surrender his rights to be a good father and states he wants his daughter in his life forever. Petitioner states he wants to raise his child. Petitioner states he believes respondent has surrendered her rights and states the child is currently residing with the potential adoptive parents."

Process issued returnable November 1, 2004. On October 15, 2004, in the paternity proceeding petitioner and his mother, respondent birth mother and her adoptive mother, Ms. Bleshner, the director of Family Focus, appeared. Notably, there was no appearance by the respondent mother's law guardian, counselor Balahtsis. The DNA test results marked in evidence disclose the probability of paternity as 99.99 percent. The court issued an order of filiation for Kareem W_____ who is recognized as the legal father of the subject child. Of critical import, only two weeks later on November 1, 2004, the return date on the father's petition for custody (V-17442/04), attorney Deana Balahtsis appeared and filed a notice of appearance as attorney for Mr. and Mrs. Anonymous. Counselor Frederick J. Magovern appeared and filed a notice of appearance as attorney for Family Focus Adoption Services. Coincidentally, their respective notices of

appearance reflect the same office address, including suite designation and the same office phone number. Petitioner father and his mother appeared. Helen Cooper Gregory was assigned by the court as law guardian for the subject child., The custody matter was transferred and adjourned to Part 3 (DePhillips, J.) for December 13, 2004.

The court notes that at no time during the pendency of the paternity petition (P-07617/04) did counselor Balahtsis request to be relieved as law guardian for the un-emancipated birth mother nor was she relieved by the court as law guardian for the birth mother.

On December 3, 2004, Mr. and Mrs. Anonymous filed for the first time a petition to adopt the subject child who had been in their physical care since April 4, 2004, a period of eight months (A 17771/04). In the adoption proceeding they are again represented by counselor Balahtsis. On December 13, 2004, in the custody proceeding (V-17442/04), the petitioner father appeared and is assigned Janet Brown, Esq. from the 18B Panel as law guardian. The pre-adoptive parents appeared with their counsel, Ms. Balahtsis and attorney Magovern appeared for the agency. The subject child's law guardian, Helen Cooper Gregory appeared. Family Focus moved to dismiss the father's custody petition, or in the alternative have it transferred to Part 2 (Hunt, J.) on the understanding that the recently filed adoption petition had been assigned to Part 2. The matter was adjourned to January 7, 2005. On January 7, 2005, the court noted that Part 2 had transferred the adoption proceeding to

Part 3 resolving the request for relief submitted by Family Focus and in which the pre-adoptive parents conjoined. On January 18, 2005 the birth father and his mother, the birth mother and her adoptive mother, the law guardian for the father and respective counsel for Family Focus and for the pre-adoptive parents appeared. Ms. Dorothy Land from the 18B Panel was assigned as law guardian for the un-emancipated birth mother. After speaking with her client she advised the court that she has concerns that the extrajudicial surrender obtained from the birth mother who had no independent legal counsel at the time of the surrender, may be tainted by duress. Mr. Allan Shafter was accordingly appointed guardian *ad litem* for the birth mother in the exercise of the courts *parens patriae* authority to effect maximum due process. An oral application to recuse the pre-adoptive parents' counsel Deana Balahtsis was denied without prejudice to formal application with the court's instruction that counselor Balahtsis consider the circumstances and determine on her evaluation whether to recuse herself. The issue is framed in the appearance of a conflict of interest arising by virtue of the fact that she appeared as law guardian for the birth mother as already noted and in the chronology as elucidated above, appeared as attorney for the pre-adoptive parents. The court noted that its *parens patriae* power extends not only to the subject child, Seasia, but also to the birth parents as they are all un-emancipated minors at the time of the extrajudicial surrender by the birth mother and the filing of all the petitions

delineated herein. The issues are framed as to whether the birth mother's extrajudicial surrender is valid and whether the legal birth father is a consent father. The court issued a temporary order of visitation for the subject child and her biological parents to be supervised by Safe Horizon. On March 7, 2005, Dorothy Land was relieved as law guardian for the birth mother at counselor Land's request due to personal health reasons and attorney Shafter was appointed law guardian in her place, necessitating his being relieved as guardian ad litem and attorney Susan Gerner was appointed from the 18B Panel as guardian ad litem for the birth mother.

On April 5, 2005, the court granted the formal motion filed by the birth father to relieve attorney Balahtsis as attorney for petitioner pre-adoptive parents due to the apparent conflict of interest, counselor Balahtsis having evaluated her conduct as not involving the appearance of a conflict of interest or of any appearance of ethical impropriety. Apart from the exercise of its inherent *parens patriae* authority in granting this application, this court relied on the plain language of Social Services Law §374(6) which states in unequivocal and unambiguous terms: "No attorney or law firm shall serve as the attorney for, or provide any legal services to both the natural parents and adoptive parents." An appeal from this court's order relieving attorney Balahtsis was taken to the Appellate Division of the Supreme Court Second Department. The appellate court did not stay this court's order relieving counselor Balahtsis. It stayed the pro-

ceedings before Family Court pending resolution of this appeal as delineated in its decision and order dated April 27, 2005. On the appeal the subject child's law guardian supported the court's determination as delineated in her brief to the Appellate Division. By decision and order dated January 17, 2006, the appellate court issued a decision and order reversing this court's order and denied the application of the birth father to disqualify petitioners' counsel on the ground that he had no standing to make the application. While dismissive of the application of Social Services Law §374 (6) to the circumstances presented on the record, the appellate court stated: " We note that this does not mean that Balahtsis' prior representation of Tenisha D. cannot or will not give rise to a conflict of interest." The appellate holding restricts the application of the unequivocal legislative proscription against an attorney representing or providing "any legal services" to both birth parents and adoption parents, to an attorney arranging for the adoption. This court is bound by the wisdom of this appellate holding. However, it might be argued that the reversal is clearly predicated on the lack of standing issue and the appellate observations as to Social Services Law §374(6) be viewed as dicta. This court simply notes that the legislative history of the section clearly articulates the legislative will "to clarify that no attorney or law firm shall serve as the attorney for both the natural parents and the adoptive parents, a practice which should not be tolerated in New York:" (Senator Mary B. Goodhue 37th S.D. in letter dated June 28, 1989 to

Hon. Evan A. Davis, Executive counselor representing S. 5011, then before the Governor). In light of the appellate determination, the stay of these proceedings before Family Court was lifted. In January, 2006, attorney Helen Cooper Gregory, law guardian for the subject child, having left the 18B Panel, was relieved and attorney Toba Stutz from the Panel was appointed law guardian for Seasia.

The hearing on the critical issues of the validity of the extrajudicial surrender and whether the legal father is a consent father commenced on March 20, 2006. This court received from the Appellate Division upon its determination of the appeal on the disqualification of attorney Balahtsis, the briefs filed on that appeal. The court read the statement of facts in law guardian Shafer's brief to the appellate court, which begins:

> "Tenisha G-D (Tenisha) is the 14 year old infant mother of Seasia D. who gave birth to Seasia . . . . Tenisha as a former foster child who was adopted shortly before Seasia was conceived. When Tenisha informed her adoptive mother that she was pregnant, she was given two choices: either surrender the baby for adoption after her birth or leave the adoptive home and return to foster care. The adoptive mother strongly urged her to choose the first option and brought her to Family Focus Adoption Services (FFAS) allegedly an authorized agency where she executed a non-judicial surrender of her parental rights. It is claimed that Tenisha was given social work counseling and assistance prior to the surrender, but the

> nature and extent of that counseling and assistance is unclear at this stage of the proceeding. It is clear, however, that Tenisha was given no legal counseling and met with no lawyer prior to her executing the surrender."

The court accordingly inquired of the infant birth mother's law guardian at the commencement of the hearing as to any position he might have with respect to her extrajudicial surrender. Law Guardian Shafter replied that he believed there is a "cloud over the extrajudicial surrender", but that the present wish (circa March 20, 2005) of the birth mother is to contemplate a judicial surrender.

Parenthetically the court notes that by notice of motion dated January 25, 2006, approximately one week after the appellate decision and order reversing the disqualification of Attorney Balahtsis, she moved to relieve this part (DePhillips, J.) from presiding over these proceedings on the grounds that the sole focus of the proceedings must be limited to the issue of whether the birth father is a consent father and the court has demonstrated bias toward counselor Balahtsis and the petitioners pre-adoptive parents by granting the disqualification motion in the first place and by the comments of the court, such as these proceedings entail a "search for truth". This recusal motion was denied on its lack of merit and in the exercise of the conscience of this court.

At the commencement of the hearing on March 20, 2006, the attorney for the agency Family Focus Adoption Services in the presence of all counsel and of the pre-adoptive and birth parents, advised

that counsel for the pre-adoptive parents, Ms. Balahtsis, consented that "it would be appropriate if (the agency attorney) presented the petitioners' case" (Trial Transcript dated March 20, 2006, p. 32). The following testified on petitioner pre-adoptive parents' case: respondent Kareem W_____, the infant legal father, Ms. Maris Bleshner, the director of Family Focus Adoption Services and petitioner pre-adoptive parent, Mr. Anonymous. The following testified on respondent birth father's case: Mr. Antonio Lawes, Ms. Margie F_____, Tenisha D_____, the infant birth mother, Ms. Ekta Isaacs, a social worker at Safe Horizons, Denise W_____, maternal aunt of the birth father, Ms. Ann K____, sister of the birth mother, and Karen S____, mother of the infant birth father and paternal grandmother of the subject child Seasia. Ms. Margie F_____ also testified as a witness for the birth mother. The court paid close attention not only to the testimony of these individuals but also to their demeanor while testifying. The court finds the birth father, Kareem W_____, petitioner, Mr. Anonymous, Mr. Antonio Lawes, Ms. Margie F_____, Ms. Ekta Isaacs, Ms. Denise W_____ and Ms. Karen S_____ generally credible. The court finds Mr. Maris Bleshner, Ann K_____ and the birth mother of more limited credibility.

The court finds that the legal father of the child Seasia stands before this court never having been arrested for, charged with or convicted of rape. The court finds that at all relevant times in connection with this litigation, the birth parents of the subject

child are themselves infants, that is un-emancipated minors. Credible testimony discloses that the birth mother Tenisha D_____ became pregnant in consequence of a single act of intimacy between the birth parents at the Church which they and their respective families attended in Staten Island. At the time of this act, Tenisha was thirteen years of age and Kareem W_____ was sixteen years of age. The incident occurred late June-early July, 2003 under circumstances where these two children together with other children were aiding the adult parishioners who ran and are volunteers at the church pantry, in transporting a large shipment of food supplies from the ground floor upstairs at the church. Kareem's mother is downstairs and Tenisha's sister, Ann K____, the adult child of Tenisha's adoptive mother, Phylis D____, is also downstairs overseeing the activity. Ann K___ is the wife of the church's pastor. There is no outcry or any disclosure by Tenisha of this event for some five months. The record discloses that Tenisha was in foster care since a baby and had been in approximately three to four prior foster homes before coming to live with Ms. Phylis D____ aka Mother D____. She lived with Phylis D____ at least three years prior to being adopted by Ms. D____ somewhat proximate in time to this act of intimacy. The disclosure of Tenisha's pregnancy came about because her adoptive mother became suspicious of Tenisha's furtive conduct and because of the mother's practical experience as a nurse. In early November 2003, the adoptive mother physically examined her adoptive daughter's belly and

estimated her daughter to be approximately four and one-half months pregnant. A subsequent medical exam by a doctor verified this fact. Tenisha did not disclose to her adoptive mother nor to her adoptive sister Ann K____ her allegation that she had been raped by Kareem W_____. The disclosure was to a doctor and to her counselor in the therapy she had been enrolled in much earlier due to her experiences in prior foster homes.

Mother D____ upon hearing this news instructed Ann K____ to contact her fellow parishioners, the family of Kareem W_____, to set up a meeting the next Sunday after church. Present at this meeting which occurred on November 19, 2003 in the home of Karen S____, Kareem's mother, are *inter alia,* Karen S____ and her son Kareem, Mother D____, Ann K____ and Tenisha, and Karen's sister, Denise W_____. Denise W_____ videotaped this meeting without the knowledge of Tenisha, her adoptive mother and sister. The videotape of this meeting is marked in evidence as Father's Exhibit A. The content of the videotape discloses two families upset at the discovery that a sexual encounter between an infant member of each family has resulted in a pregnancy. The adoptive mother is observed on the tape as disbelieving her daughter's claim of rape because her daughter repeatedly lied to her on multiple occasion when the mother would inquire during that period of pregnancy (five months) if the young lady was experiencing her menstrual cycle. Phylis D____ is also observed stating that if it were rape (by force), there was no change in her daughter's demeanor toward Kareem as both families

attended church during this five month period and she observed her daughter following after Kareem. Tenisha testified at the hearing that she never told anyone Kareem W_____ had not raped her. However, on the issue of her credibility, the court notes that the videotape (Exhibit A in evidence) discloses her making a statement at the meeting that she lied to the doctor when she said she had been raped. Further on the issue of Tenisha's credibility, a report from Safe Horizon filed with the court in connection with the court's order that both infant birth parents have supervised visitation with their daughter supervised by Safe Horizon, discloses an entry as to Safe Horizon's interview with Tenisha. The report is in evidence as law guardian's Exhibit VI and the entry reads as follows: "When asked about her relationship with Kareem W_____, Ms. D_____ stated that she met Mr. W_____ in church in 2001. Ms. D_____ stated that she and Mr. W_____ had sexual relations once, and that she became pregnant as a result of that sexual encounter. Ms. D_____ reported that she consented to have sex with Mr. W_____, but that she told her adoptive parents that Mr. W_____ raped her because she feared her parents would punish her." Accordingly there are two prior inconsistent statements by the birth mother admissible on the issue of credibility. The record also shows that although she was taken by her mother and sister to the district attorney's office in Queens and instructed to go to Staten Island, upon interview in Staten Island by the authorities, she determined not to go forward with the rape allegations. The

record is also replete with an articulation that the birth mother was sexually active with at least one other male at the time of conception which articulation is illuminated in the testimony of the director of Family Focus Adoption Services, Maris Bleshner, the testimony of Ann K_____, the birth mother's sister and the testimony of the birth mother. Indeed, the birth mother's own law guardian Deana Balahtsis in the paternity proceeding brought by Kareem W_____ (P-07617/04) stated on joinder of issue between the petitioner infant, putative father Kareem W_____ and the respondent infant birth mother Tenisha D_____, on September 8, 2004 my client was "raped" by the petitioner, but had sex with other males as well. This theme of possible promiscuity on the birth mother's part is echoed in the testimony of Ms. Bleshner (Minutes of March 22, 2006, pp. 41-42, 44, 46; Minutes of March 23, 2006, p. 7).

The videotape of the November 19, 2003 meeting of the two families discloses a conjoint exhortation by the two mothers to Tenisha to tell the truth. Tenisha's guardian, her adoptive mother, and her adoptive sister, Ann K____, wife of the pastor, were there to protect her from evil or malicious persuasion to lie. While her adoptive mother was visibly upset with her and while Kareem's mother was very concerned about the serious implications of forcible rape, there was no exhortation to lie or cover up. The tape discloses that Tenisha was not abused or subjected to indignity. At the conclusion of the meeting, outside the residence and dehors the videotape, testimony of Karen S____, her sister

Denise W_____, and Ann K____ reflect that Karen and Denise escorted Tenisha, Phylis D___ and Ann K____ to their car. It is the testimony of both Karen S____ and Denise W_____ that Karen S____ (Kareem's mother) expressed a desire to be part of raising the unborn child, only to be met with the response by Phylis D____ -if you can find it. (It is noted at this point that the adoptive mother Phylis D____ died on October 21, 2005 during the pendency of the stay of this proceeding by the appellate court as already noted. In consequence, this court did not have the benefit of any in court testimony from the adoptive mother). Ann K____ denies that Karen S____ requested to be in the unborn child's life.

Margie F_____, a parishioner at the church (Beulah Community Church) attended by these two families testified that she knew the two families. She found out that Tenisha was pregnant and that Kareem W_____ might be the father. She gave Tenisha around late November, a list of phone numbers including her and her children's numbers and the number of Karen S____ and Karen S____'s sister. Ms. F_____ declared that she did this because she was "led to believe that Tenisha was probably no longer going to be living with Mother D____, and we wanted her to have numbers to contact us. . . . Oh-was told that maybe she was gonna be-removed from the home for -you know, what had happened to her. . . . Well [Mother D____] just-was upset that she was, you know, became pregnant and it was, and she didn't know she was pregnant, before she had adopted so she was gonna see if she

can get the adoption overturned so we thought she was gonna be goin' away, so we wanted her to have our numbers". Ms. F_____ stated that Mother D____ obtained this list that was given to Tenisha and became upset with Ms. F_____.

At Phylis D____' aka Mother D____' direction, Tenisha no longer attended service at the church. In January 2004, Phylis D____ contacted Family Focus Adoptive Services (Trial Transcript dated March 22, 2006, p. 26). Antonio Lawes, the social worker employed by Seamen's Society for Children and Families who had been assigned to Tenisha while in foster care with Phylis D____, related that Tenisha was adopted in September 2003. He received a telephone call from the adoptive mother expressing *inter alia* disappointment that Tenisha was pregnant. Mr. Lawes also related that he subsequently received a telephone call from a female who identified herself as the mother of the child who had impregnated Tenisha. According to Mr. Lawes, this call came from out of state and the woman was requesting information about Tenisha (Trial Transcript dated March 22, 2006, pp. 89-90).

On April 1, 2004, the subject child Seasia was born. On April 3, 2004, Tenisha signed an extrajudicial unconditional surrender of her child to Family Focus without benefit of legal counsel. The record clearly shows that no counseling services were provided the infant birth mother by the adoption agency with respect to this child's knowingly and voluntarily consenting to the adoption, the agency relying on the mere representation that the child was already in counseling which counseling

as a continuous endeavor pre-dated the pregnancy. However the agency clearly knew that the child became pregnant at thirteen years of age, had recently been adopted only four months prior to the adoptive mother contacting the agency; that the child was enrolled in special education and was alleged to be sexually active with men. According to testimony by Ms. Bleshner (the agency director), Ann K____ (the adult sister of the birth mother) and the birth mother, no inquiry was made by the agency as to the circumstances of the impregnation of the birth mother at thirteen years of age and no information was supplied to the agency. The dialogue was permeated with a "don't ask, don't tell" approach under circumstances which warranted a reasoned and searching inquiry.

The record clearly demonstrates a course of action on the part of Kareem W_____ and his mother Karen S____ to maintain contact with the birth mother subsequent to the November 2003 meeting of the two families and the calculated endeavor on the part of Tenisha's adoptive mother aided by Ann K____ and her husband to frustrate that endeavor and even to intimidate the infant birth father and his family with the accusation of statutory rape. The record clearly demonstrates that Karen S____, as the natural guardian of her son, supported him in his endeavor to be a part of his daughter's life both prior to and after the child's birth. Within his limited capabilities Kareem independent of the efforts of his mother on his behalf, rode his bike to church in the hopeful expectation that he might see Tenisha—a small but significant

act. On or about January 26, 2004, Kareem accompanied by his mother, went to the church to speak to Pastor K____ in his continuing endeavor to be involved and included in his then unborn child's life. With the support of his mother, he advised that he wanted to be at the hospital when the child is born and wanted to be involved in the naming of the child. According to Kareem and his mother, this inquiry and offer were rebuffed by Pastor K___ who intimated that if Kareem engaged in such endeavor he would be arrested. Karen S____ as the mother of Kareem inquired of her pastor as to why her son would be arrested. Pastor K____, according to Karen S____ and Kareem stated—for statutory rape. Undaunted, Kareem continued his endeavor to be involved with and to be recognized as the father of Seasia. The efforts of Kareem and his mother in their credible testimony are cross-corroborated by the testimony of Ms. F____ and Mr. Lawes. Seasia was born April 1, 2004. The birth mother isolated from the endeavor by Kareem and his mother and given only the option to sign an unconditional extrajudicial surrender of her child or be expelled by her adoptive mother back into foster care, signed the surrender on April 3, 2004, without the benefit of an attorney. The agency's record in evidence, the testimony of the agency director, the silence at the time of the execution of the surrender on the part of the adoptive mother and Ann K____—all reflect that an open adoption was not intended and not provided for. The birth mother presently with the benefit of the circumstances occurring since the surrender including the persistence of the birth

father to vindicate his position as father and his daughter's birthright to have a father, now recollects that she wanted an open adoption. If so, it is clear that unlike Kareem, she did not receive the support of her guardian, her adoptive mother.

As credibly testified to by Kareem W_____ and his mother, on the very day of Seasia's birth, which birth was unknown to them at that time, they went to Family Court in Staten Island to inquire if there was a way that they could be informed if the child had yet been born. According to them, they were advised that it was their responsibility to discover if the child was born. As already noted on April 23, 2004, only three weeks after the child's birth, without actual knowledge of the birth mother's surrender, and many months prior to the filing of the instant adoption petition, the birth father files the first of his paternity and custody petitions.

Preliminary to a discussion of the legal issues presented, the following observations are made: the right to conceive and raise one's children is an essential right and a basic civil right of man and far more precious then property rights. (*Meyer v. Nebraska*, 262 US 390; *Skinner v. Oklahoma*, 316 US 535; *May v. Anderson*, 345 US 528; *Lehr v. Robertson*, 463 US 428; *Cabin v. Mohammed*, 441 US 380). Adoption is in derogation of common law. Accordingly the adoption statutes must be strictly construed and observed (46 NY Jur 2d, Domestic Relations §581). The integrity of the adoption process must be paramount for all adoptive children are at risk (*Matter of Grand Jury Subpoenas* [Morgenthau] 58 AD 2d 1, 6[1st Dept. 1977]). With

respect to adoption proceedings, integrity prompts recognition that in order to constitute fraud, not only out-and-out, direct misrepresentation, but evasion, withholding information from the court, the failure to disclose in an open and fair manner certain critical facts in relation to the history of the controversy and the prior conduct of the parties would be sufficient (*Matter of Lord*, 28 AD 2d 1203 [4th Dept. 1967]).

With respect to the extrajudicial surrender it is not disputed that the infant birth mother, fourteen years old, signed the unconditional surrender without the benefit of legal advice from an attorney. This occurred under circumstances where there is no sufficient articulation of such counseling services being offered her specifically with respect to adoption, "open" or otherwise, or the alternative thereto. The agency director Ms. Bleshner admitted that the agency record is "skimpy" and the nature of the record as admitted into evidence, fully justifies that adjective. It is beyond cavil that the *parens patriae* authority of Family Court extends not only to the subject infant child Seasia, but also to her birth parents who were infants at all times relevant to this litigation. Due process for Seasia is due process for her birth parents and due process for her birth parents is due process for her. The State must provide safeguards to ensure that the surrender by an un-emancipated minor is a voluntary, knowing and informed decision. The contractual terms of the surrender are subordinate to the constitutional concern of due process. It is incontestable that the interest surrendered by the

infant birth mother is "nothing less than a constitutional right of the first magnitude, the right of the parent to raise her child, *Stanley v. Illinois*, 405 U.S. 645,651,92 S. Ct. 1208,31 L. Ed. 2d 551 (1972), and the right of the child to be raised by her parent. *Matter of Bennett v. Jeffreys*, 40 NY2d 543, 546, 387 N.Y.S. 2d 821, 824, 356 N.E. 2d, 277, 281 (1976)" (*Janet G. v. New York Foundling Hospital*, 94 Misc 2d, pp 57-57133, 141,403 N.Y.S. 2d 646, 651 [Family Court 1978]. With respect to the "surrender" contract whereby the minor surrenders their child for adoption, vindication of the ideal that a child is not chattel mandates that "the unequivocal essence of the responsibility to the *minor* is the moral imperative of the fiduciary. In the realm of commerce, the standard of conduct demanded of a fiduciary is absolute: 'the punctilio of an honor the most sensitive'. *Meinhard v. Salmon*, 249 N.Y. 458, 464,164 N.E. 545, 546, (1928), per Chief Judge Cardozo." (*Janet G. v. New York Foundling Hospital*, 94 Misc 2d at 144, 403 N.Y.S. 2d at 653). Constitutional law, due process, right reason and common sense impel recognition that legal advise is a basic component of an infant surrender by a parent who is a minor. While the infant birth mother executed this extrajudicial surrender and by its terms it is irrevocable, until formal adoption occurs it is a contract subject to judicial supervision and may not bar the vacating of the surrender for fraud, duress or coercion in the execution or inducement of the surrender (Social Services Law §384(5) *Matter of Franciska J. GG v.*

Duquette, 64 AD2d 787,407 N.Y.S. 2d 750 [3d Dept. 1978]).

The fact of pre-adoptive placement of the child does not create any new legally recognized relationship, but as a consequence of the executed surrender, the State becomes a party to the contract and acts as *parens patriae* through judicial supervision of that surrender (*Schenectady County Department of Social Service v. Patricia Ann S.*, 73 Misc. 2d 104, 107-108, 341 N.Y.S. 2d 169, 174 (Family Court, 1972, Howard A. Levine J.) The lack of an independent attorney retained for the birth mother or assigned by court to the birth mother, a fourteen year old infant herself, to provide counsel and guidance on the legal aspects of an issue as important as adoption of her baby is manifest. The absence of such counsel implicates an issue of constitutional magnitude. This court notes the sage observations delineated in *Matter of the Adoption of X*, 84 Misc 2d 770, 772-773, 376 N.Y.S. 2d 825, 828 (Surrogate Court, Cattaraugus County, 1975):

> "The courts of this state have a history of zealously guarding the interest of infants. This is borne out of a recognition of their immaturity and a judicial appreciation of their inability to adequately protect their interests. Representation of infants by adults as guardians ad litem *is not an exception, but the common place requirement* in our jurisprudence. We see it daily in the prosecution and defense of negligence actions, in real property transactions, in probate proceedings, in actions concerning

commercial enterprises. In fact, other than in the presently considered area of adoption this court cannot recall an exception to the requirement that the interest of an infant be protected by an adult guardian in judicial proceedings.

This court finds *something fundamentally wrong with a jurisprudence that requires adult representation for an infant girl seeking to contract away her doll, but not her baby.* Justices Cohalan and Munder in their dissent in *Matter of T.W.C.* (anonymous) properly termed this void 'an anomaly that cries out for correction.' (48 AD2d 893 at 894)" (*Emphasis supplied*). (See *A.F. v. Spence Chapin Agency*, 142 Misc 2d 412, 537 N.Y.S. 2d 752 [Family Court, Kings County, 1989]; *Matter of Tricia Lashawnda M.*, 113 Misc 2d 287, 296, 451 N.Y.S. 2d 553, 558 [Family Court, Queens County, 1982]).

Social Service Law §384 deals with surrenders of children not in foster care and §383-C with surrenders of children in foster care. Under §383-C the authorized agency is mandated to file an application for approval of the extra-judicial surrender with the court. Under §384 which applies here because Seasia was not in foster care, subdivision 3 states that if the parent surrendering the child for adoption is in foster care, the instrument shall be executed before a judge of the Family Court. Tenisha, the infant birth mother got pregnant while in foster care, but gave birth after leaving foster care by virtue of being adopted by her foster mother. She testified on this record and has disclosed to at

least two of the three law guardians who represented her in these proceedings, that she was instructed by her adoptive mother to surrender the child for adoption or to leave the mother's home and be placed back into foster care. The protection offered her as an un-emancipated child *in* foster care of having the surrender executed before the court is not afforded her although she is still an un-emancipated minor, because she is no longer in foster care, albeit the aspect of duress is articulated in the threat to go back into foster care. What is the distinction under the equal protection of the law analysis in her status as an un-emancipated minor to the protection afforded by a judicial surrender whether she is in foster care or not?! This protection is not an abstract proposition but is at the heart of due process, to wit that execution of the surrender before the court would necessitate that an un-emancipated minor be appointed a law guardian even for purposes of waiving counsel (See Family Court Act §§241, 242, 243, 249; 249-a).

The court finds that the extrajudicial unconditional surrender signed by the infant fourteen year old birth mother on April 3, 2004 is void in that she executed same without benefit of independent legal counsel as to the legal consequences and as to the options otherwise available to her and without the benefit of counsel in making a voluntary and informed determination to waive counsel. This is not only an absence of fundamental due process, it is deprivation of the civil rights of the un-emancipated birth parent under circumstances where that right is of constitutional magnitude and guaranty.

The court also finds that such surrender instrument is void as being given under duress. The record clearly demonstrates the concerted endeavor by the birth mother's adoptive mother to isolate Tenisha from any support or overture of support from the father, his mother, their relatives and friends. The nature of the support Tenisha received from her adoptive parent was the stark choice: give up your baby to unconditional adoption or go back to foster care. While one may indulge in an expectation that a birth parent surrendering their child for or consenting to adoption and a pre-adoptive parent accepting and adopting that child may be motivated by love, that expectation by implication does not extend to those in the business of adoption.[4]

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[4] A void extrajudicial surrender gives rise to an unauthorized placing out of a child. When the adoption agency involved in such placing out operates for profit rather than in a "not for profit" context, the implication of trafficking in babies arises. "The evil is found in the *business* which may arise from such placements. A trade in human beings was not intended to be permitted, and cannot be condoned, regardless of by how circuitous a route the practice is conducted" (*People v. Scopas*, 11 NY 2d 120, 126 (1962) (Burke, J. dissenting). The protection against this evil where minors are concerned resides in the constitutionality firm mandate that such surrenders occur only in the *judicial* context and that the conduct of counsel whether representing the agency or the birth parent or the adoptive parent be governed by the moral imperative of the fiduciary–"The punctilio of an honor the most sensitive". Of necessity this requires the avoidance of an impermissible conflict of interest by representing and/or advising both the biological mother and the adoptive parents (See *Matter of Michaelman*, 202 Ad 2nd 87, [2nd Dept 1994], lv denied 84 NY 2d 811).

With respect to the issue of whether the birth father, Kareem W_____, also an infant at the relevant times with respect to these proceedings, is a consent father, the court takes the following preliminary observation: the argument initially advanced by the agency's counsel and petitioner's counsel, conjoined in subsequently by the third and current law guardian for the birth mother, is that Kareem W_____ has no standing because he is guilty of "statutory rape" and therefore may not benefit from his illegal or immoral action, citing *Riggs v. Palmer*, 115 NY 506 (1889) and *Matter of Hines v. Sullivan*, 105 Misc 2d 288 (Family Court, Onondaga County, 1980). Study of the holding in *Riggs v. Palmer* and its progeny, warrants the inescapable conclusion that its scope as to public policy is limited to "property" and within the embrace of "property", money. As noted in the decision at pp. 511-512 "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. The maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

This decision on its facts held that the laws relating to the probate of wills and the distribution of estates (property) will not be construed so as to secure the benefit of a will to a legatee who killed the testator in order to prevent a revocation of the

will. If the subject child of the pending adoption and custody proceedings be deemed chattel and regarded as property, then the argument of these counsel obtains relevance. However, the law is crystal clear that children are not chattel. They are human beings and the parent-child relationship is of such paramount importance that it is entitled to constitutional protection. In *Matter of Hines*, 105 Misc 2d 288, the Family Court, Onondaga County, 1980, applied this public policy property concept in dismissing a paternity petition solely on the basis that the 16 year old putative father had sex with a 14 year old girl, to wit sexual misconduct, without considering the merits of the paternity claim. The state legislature has adopted the policy consideration delineated in *Riggs v. Palmer* in the area of adoption in only one respect: Section 384-c, Subd. 1 of the Social Services Law was amended in 1979 to read: "Persons specified in subdivision two of this section (enumerating those persons entitled to notice of the proceeding) shall not include any person who has been convicted of rape in the first degree involving forcible compulsion, under subdivision one of section 130. 35 of the penal law, when the child who is the subject of the proceeding was conceived as a result of such rape. As aptly observed in *LaCroix v. Deyo*, 108 Misc 2d 382 (Family Court, Ulster County, 1981) at, pp. 389 and 391-392:

> "Public policy of the State is evidenced by expression of the will of the Legislature contained in statutory enactments, and such policy is material in the exposition of legislative

intent in other statutes in case of ambiguity" (McKinney's Consolidated Laws of New York, Book 1, Statutes s 126). The text of s 126 continues: "Public policy is necessarily variable and changes with changing conditions but is evidenced by expression of the will of the Legislature contained in statutory enactments, and the State's public policy as determined and recorded by the Legislature, may not be changed and rewritten by court to satisfy its own private notion of what such policy should be. Public policy of the State is what the Legislature says it is where the Legislature has spoken, and a policy so declared sometimes has to be followed by the courts in areas beyond the express reach of the statute for the sake of consistency in the administration of law." (Citing *Steinberg v. Steinberg*, 18 N.Y.2d 492). . . . If the father of an illegitimate child has rights to that child which must be recognized by the courts (*Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551; *Matter of Pierce v. Yerkovich*, 80 Misc 2d 613, 614, 363 N.Y.S.2d 403); if the adoption of his out of wedlock child cannot be accomplished without his consent, (*Caban v. Mohammed*, 441 U.S. 380, 99 S.C. 1760, 60 L.Ed. 2d 297) and he is entitled to notice of legal proceedings affecting the child (Dom. Rel. Law, s 111-a; Social Services Law s 384-c); if a married woman is not barred by her adultery, a Class B Misdemeanor (Penal Law s 255.17) from maintaining a paternity suit and presumably would not be barred from

> maintaining such a suit to establish the paternity of a child conceived as the result of either a bigamous or an incestuous relationship, both Class E felonies (Penal Law s 255.15 and s 255.25); and neither amorality, immorality or deviate sexual conduct, or adultery, a Class B. Misdemeanor (Penal Law s 255.17) automatically disqualifies a parent from seeking or retaining the custody of a minor child why should sexual misconduct between children in which only the male participant is guilty of a crime (Penal Law 130.20) [FN5] bar a putative father from maintaining a proceeding to establish his status to seek the custody of a child born of that relationship (F.C.A s 511)? The Court of Appeals has recently declared, "(I)t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values" (*People v. Onofre*, 51 N.Y.2d 476, 488, n. 3; see also dissenting opinion of MEYER, J., in *People v. Bertie Otis Whidden Jr.*, 51 N.Y.2d 457)."

The Family Court Judge in *LaCroix v. Deyo* declined to follow the holding in *Matter of Hines v. Sullivan*. This court similarly rejects the notion that children are chattel. Public policy as declared by the legislative branch of governmental and due respect for the separation of powers among the three branches of government mandate that this court reject the invitation of the counsel for the agency and the law guardian for the birth mother

to legislate public policy under the guise of a judicial pronouncement. The adjudicated father herein has not been convicted of rape in the First Degree. Accordingly estoppel and public policy invocation on moral grounds to defeat the standing of the adjudicated father of the child to seek custody of the subject child and to seek dismissal of the adoption proceeding is without legal foundation. He has such standing as a matter of law.

In *Matter of Raquel Marie X.* 76 NY 2d 387 (1990) the Court of Appeals declared that the requirement of Domestic Relations Law §111(1)(e) that an unwed father openly live with the child's mother for six continuous months before the child's placement for adoption, as a condition to the father's right of consent to adoption, renders the statue infirm under the Federal Constitution. Noting that in the case of a child placed for adoption at birth, the father can have no more than a biological connection to the child, there having been no chance for a custodial relationship, the court recognized a federal constitutional right to a relationship by such father so long as he promptly avails himself, of the possible mechanism for paving a legal and emotional bond with his child, characterized as asserting his intent promptly and manifesting an ability and willingness to obtain custody of the child. Domestic Relations Law §111(1)(e) was declared unconstitutional in its entity. The Court of Appeals instructed that until there is new legislation, courts will be guided by principles gleamed from the decisions of the Supreme Court of the United States. In *Matter of Robert O. v. Russell K.*,

80 NY 2d 254 (1992), the Court of Appeals further elucidated its teaching embraced in *Matter of Raquel Marie X., supra.* The court instructed that like the notice statute, the standards set forth in *Raquel Marie* presuppose that the father knows he is a father. The court of Appeals in *Matter of Robert O.* states:

> "Manifestly, the unwed father of an infant placed for adoption immediately at birth faces a unique dilemma should he desire to establish his parental rights. Any opportunity he has to shoulder the responsibility of parenthood may disappear before he has a chance to grasp it, no matter how willing he is to do so. Accordingly, we have acknowledged that in some instances the Constitution protects an unwed father's *opportunity* to develop a relationship with his infant son or daughter *(id.,* at 401-402). This constitutional right to the opportunity to develop a qualifying relationship does not extend to all unwed fathers or arise from the mere fact of biology. The right exists only for the unwed father who manifests his willingness to assume full custody of the child and does so promptly. . . . In *Raquel Marie,* we [found] that the father in a companion case, *Matter of Baby Girl S.* (see, 141 Misc 2d 905), had gained a protected liberty interest, even though he failed to meet the statutory requirements of Domestic Relations Law §111(1)(e), because he had done "everything possible to manifest and establish his parental responsibility" (*Matter of Raquel Marie X., supra,* at 409). His failure to meet the

> statutory requirements promptly was due not to his own failings but to the concerted actions of the mother and the adopting parents to frustrate his efforts. Under those circumstances, we held that "a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under six-moth old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship" (*id.*, at 403)."

Under the clear circumstances delineated in the record of the proceedings before this court, Kareem W_____ has manifestly demonstrated his willingness to assumed full custody of the child and has done so promptly under circumstances where there has been a concerted endeavor to frustrate his efforts and to intimidate him in his endeavor to avail himself of the opportunity to demonstrate that he is willing and able to enter into the fullest possible relationship with his child. It is beyond cavil that his persistent efforts commencing in November 2003 when he was informed that Tenisha was pregnant were manifested prior to the child being born, prior to the birth mother's execution of the surrender, prior to the child being placed with the petitioners and prior to the filing of the adoption petition. This endeavor is devoid of any overtone of a motive to simply "block" the adoption. The actions of Kareem W_____, an infant himself, at all rele-

vant times must be viewed in the context of the actions taken by his guardian, his birth mother, Karen S____. For this purpose she may be regarded as his representative and her actions on his behalf attributed to him. It is perplexing to the court that the agency attorney who presented the case on behalf of the petitioners, adoptive parents, would characterize the parent-child relationship between Kareem, an un-emancipated minor, and his mother with the denigrating description in summation dated June 19, 2006 p. 8: "In an effort to excuse his inaction, Mr. W_____ tries to hide behind his mother's skirt and to arrogate to himself the supposed actions of his mother. . . ." This perplexity is engendered in part by the obvious recognition by the agency of the role of the parents an un-emancipated minor, as for example, the agency obtaining the execution by the adoptive mother of a document entitled "Consent to Adoption by Grandparent" on April 3, 2004. This document, while ostensibly a "consent" to the adoption, utilizes the following language: "My daughter and I have discussed *her* plans to place the baby for adoption, and I fully support *her* decision, because I believe adoption to be in the infant's best interests" *(Emphasis supplied)*. The record herein and the history of this litigation reflect an apparent lack of appreciation on the part of the adoption agency that the birth parents are themselves un-emancipated minors, are themselves infants in the eyes of the law and may not be deemed un-emancipated by virtue of sexual intimacy and the birth of their child. At all relevant times in con-

nection with the legal issues before the court, Kareem W_____, the father, was a minor as defined in Labor Law §2 and his ability to support his child circumscribed by law (See, Labor Law §§130, 131, 132, 133; Education Law §3215; General Obligations Law §3-101). By analogy his ability to support is equivalent to an indigent non-custodial parent and would impel a support award of $0. (See *Matter of Rose v. Moody*, 83 NY2d 65, 607 NYS 2d 906 [1993]).

In this adoption proceeding petitioners bore the initial burden of going forward with evidence to show that the birth father's consent to the adoption was not required, but the birth father had the ultimate burden of persuasion to show that his consent was required (*Matter of Andrew Peter H.T.*, 64 NY 2d 1090 [1985]—*Matter of Domingue P. v. Leonard P.*, 24 AD 2d 335 [1st Dept. 2005]. The court holds that the credible testimony and evidence demonstrates that his consent is required.

It is well recognized that an un-emancipated child, a juvenile, who is represented by a law guardian is entitled to effective legal representation of their interests in proceedings before Family Court. The mere presence of the law guardian is not enough. That presence must engender "adequate" or "effective" legal assistance, not mere passivity (See *Matter of Jamie TT.*, 191 AD2d 132, 137-138 [3rd Dept. 1993], opinion of Levine, J. [all concur]). Regarding the legal representation of the birth mother by attorney Balahtsis in the paternity petition (P-07617/04), such representation was not limited to a special appearance to object to the

court's jurisdiction. Upon rejection of the jurisdictional argument, counselor Balahtsis continued to represent the birth mother on the subsequent date of September 8, 2004 upon joinder of issue. She participated in the discussion of the propriety of ordering blood tests and upon the court's directing such test and adjourning the matter to October 15, 2004 for resolution, law guardian Balahtsis did not request to be relieved and was not relieved from her representation for her client, the birth mother. The record demonstrated that counsel Balahtsis was retained as law guardian for the respondent birth mother in the paternity proceeding through a referral from Family Focus Adoption Services. This referral occurred subsequent to initiation of the paternity proceeding on April 26, 2004 and in consequence of service of process prior to the return date of July 6, 2004. As noted, on October 15, 2004, counselor Balahtsis, the birth mother's law guardian, did not appear to protect the birth mother's interest in that paternity proceeding. However, the adoption petition of the adoptive parents verified October 23, 2004, only eight days after that paternity hearing, reflects that they are represented by counselor Deana Balahtsis. The paternity petition is subsequently filed on December 3, 2004. The record discloses that counselor Balahtsis was retained by the petitioners on referral by this same adoption agency. As the director of this agency, Mrs. Bleshner, was in court on both September 8, 2004 and October 15, 2004 in that paternity proceeding, the inescapable conclusion is that the agency was actually aware of the representation of

the birth mother by attorney Balahtsis and in the context of that representation nevertheless referred the adoptive parents to counselor Balahtsis, upon their decision to no longer retain the services of their prior attorney. The timing implicated by this chronology reflects the bizarre possibility of almost concurrent representation or the cessation of one advocacy, for the immediate assumption of the other advocacy, with all the inherent conflict engendered thereby. While petitioner Mr. Anonymous stated that he was not aware when he and his wife retained attorney Balahtsis that she had previously represented the birth mother (Trial Transcript dated April 11, 2006 p. 142), he subsequently testified that he was aware that she had previously represented the birth mother "in a jurisdictional matter" (Trial Transcript dated April 27, 2006, p. 39). Petitioner pre-adoptive parent, Mr. Anonymous testified that somewhere about mid-October 2004, he was given the referral to Attorney Balahtsis by the agency upon his relieving his (and his co-petitioner's) prior attorney because he didn't agree with her and let her go (Trial Transcript dated April 27, 2006, p.98). Karen S____ testified that she had four conversations on the phone with petitioners between September 11 or 12, 2004 and October 15, 2004 and that in the last of those four conversations "they had told [her] that they had thought about this and that they had decided to return the baby to us" (Trial Transcript dated June 6, 2006, p. 133). The statement attributed to petitioner is hearsay and is not accepted by the court for the truth thereof. However, the court finding

Karen S____ a credible witness, does find as a fact that such statement was made. Karen S____, the paternal grandmother of Seasia, then informed the agency director of this conversation. On October 15, 2006 at court, Karen S____ and her son Kareem W_____, discovered that the petitioners had determined to go through with the adoption. These circumstances were coincidental with the agency referring the petitioners to attorney Balahtsis.

The court notes that the record in this adoption proceeding and the related paternity and custody proceeding, is instinct with dual representation and the ethical conflicts that may arise when an attorney represents two parties who have potentially adversarial interest.[5] Indeed, at the commencement of this adoption hearing, there was agreement by the petitioner adoptive parents through their counsel, attorney Balahtsis, that their case would be presented by the agency's counsel of record. Only recently the New York State Legislature passed a bill to amend the Social Services Law to prohibit an attorney or law firm from providing dual representation to an authorized agency which is qualified to place a child for adop-

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[5] With regard to the Standards of Practice for Adoption Service, 18 NYCRR, Part 421, it is required that the agency maintain appropriate records (Section 421.3 [c]), take diligent steps to identify the biological father of a child, whether born in or out of wedlock and explore the position of any putative father in accordance with Section 111(l)(d) and (e) of the Domestic Relations Law and Section 421.5 of Part 421 (Section 421.4[f]). This record discloses a less than adequate observation by the agency of these norms of conduct.

tion and adoptive parents or birth parents. This bill (Senate Bill Number 2890-A) was returned by the Governor without approval because of his expressed concern it could cause delays in the adoption process. The governor instructed that he remains concerned about the questions the sponsors raised about dual representation and wished the practice, fraught with overtones of ethical conflict to be further evaluated. The record of this proceeding furnishes another example as to why the State should act to re-enforce the ideal that in an area of law with the potential for commerce in human lives, the standard of conduct by counsel should be of the highest ethical norm—"the punctilio of an honor the most sensitive" (*Meinhard v. Salmon, supra*).

Accordingly the instant adoption petition is dismissed because the extrajudicial surrender of the infant birth mother is invalid and because the teenage birth father's consent to the adoption is required and he is not consenting, but is requesting custody of his daughter (V-17442/04). The custody proceeding which has been held in abeyance pending resolution of the adoption petition is adjourned to Part 10 on July 24, 2006. The court instructs that the subject child Seasia be produced in court on the adjourned date by the petitioners for return to the custodial care of her birth parent subject to further proceedings in the custody matter. The law guardians for the subject child and for each birth parent continue in their respective capacities with respect to the on-going proceeding between the birth parents. The court does not reach the issue of

the propriety of a *de novo* judicial surrender by the birth mother conditioned on adoption of Seasia by the petitioners with legal steps to effect "open" adoption as the birth father is a consent father and therefore such issue is academic. If it were not academic, the court notes that counseling, consequent upon an evaluation of the birth mother's psychological and emotional health and maturity with respect to the gave issues involved, would be a necessity. The court also notes that it would have referred the conduct of counselor Balahtsis in representing both the birth mother and the adoptive parents to the district attorney's office and the disciplinary committee, except for the instruction by the appellate court noted above that it does not view such conduct violative of Social Services Law §374(6). This court respectfully suggests that should an appeal ensue, the appellate court reexamine the application of Social Services Law §374(6).

SO ORDERED.

/s/ GUY P. DEPHILLIPS
Guy P. DePhillips
Family Court Judge

Dated: June 30, 2006
Jamaica, New York

United States Constitution, Fifth Amendment

Fifth Amendment—Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or other public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Domestic Relations Law
Section 111(1)

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the per-

son or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the med-

ical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

(f) Of any person or authorized agency having lawful custody of the adoptive child.